Filed 6/5/19 Teasley v. Space Exploration Technologies Corp. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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| ZHOEI M. TEASLEY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SPACE EXPLORATION TECHNOLOGIES CORPORATION,<br><br>Defendant and Respondent. | B281514<br><br>(Los Angeles County Super. Ct. No. BC568896) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Affirmed.

Schimmel & Parks, Alan I. Schimmel and Michael W. Parks, for Plaintiff and Appellant.

Fox Rothschild, David Faustman, Alexander Hernaez, and Andrew Esler for Defendant and Respondent.

Plaintiff and appellant Zhoei M. Teasley (Teasley) appeals from the judgment entered in favor of defendant and respondent Space Exploration Technologies Corporation (SpaceX) following a jury trial in this action for workplace harassment, retaliation, wrongful termination, and other claims. We affirm the judgment.[1]

## BACKGROUND

### Teasley's employment at SpaceX

Teasley was 20 years old when she began working at SpaceX as a welder on February 4, 2013. She was one of two female welders employed at SpaceX at the time and the only female welder on her shift of 15 to 17 welders. Teasley worked in a large, open space in an industrial building and reported directly to welding supervisor Sigfred Carreon and to lead welder Johnny Nguyen.

On January 14, 2014, Teasley told Nguyen that a co-worker, Anthony Perez, had made an inappropriate sexual comment to her that day and had been making such comments for the past few months. Teasley had not reported any incidents of sexual harassment prior to that date. Nguyen reported Teasley's complaint to Carreon, who then met with Teasley and told her to put her complaint in writing. In her written complaint, Teasley stated that Perez had made crude sexual comments to her on multiple occasions. Teasley further stated that Perez made inappropriate comments about her work attire

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[1] SpaceX's appeal filed June 21, 2017, under case No. B283382 was later consolidated into B281514 and then dismissed after briefing on December 4, 2018. We therefore do not address SpaceX's appeal contained in their brief filed August 28, 2018.

and that he put his finger in burn holes in her work coveralls and tore the garment.

Carreon submitted Teasley's written complaint to his supervisor, who in turn submitted it to his superior and to SpaceX's human resource department. SpaceX's human resources manager, Carla Suarez-Capdet, investigated Teasley's allegations by interviewing Teasley and the other employees in Teasley's department in January 2014. Although Perez denied Teasley's allegations, two employees, Gasio Leafa and Thomas Angell, corroborated Teasley's claims that Perez had made the inappropriate comments alleged. Angell also confirmed that Perez had torn Teasley's welding uniform. At the conclusion of Suarez-Capdet's investigation, SpaceX determined that Perez had violated the company's sexual harassment policy. SpaceX terminated Perez's employment on January 21, 2014.

At the time Suarez-Capdet investigated the allegations against Perez, Teasley referred to Thomas Angell as her best friend. A few days after the investigation, however, on January 20, 2014, Teasley told Suarez-Capdet that Angell had sexually assaulted Teasley in her home.

Teasley went on a leave of absence in January 2014. While on leave, Teasley made multiple unsuccessful attempts to obtain a restraining order against Angell based on his alleged assault.

Between January 23, 2014 and March 5, 2014, Suarez-Capdet and Lynette Dhillon, SpaceX's human resources compliance manager, conducted multiple interviews regarding Teasley's allegations against Angell. SpaceX placed Angell on an unpaid leave of absence beginning on January 30, 2014, and terminated his employment on March 7, 2014, because, on the advice of the attorney Angell retained in response to Teasley's

requests for a restraining order, Angell would not participate in the SpaceX investigation.

Teasley took 12 weeks of leave under the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) after the alleged assault by Angell. When that leave time expired on April 14, 2014, SpaceX extended Teasley's leave for an additional five months, initially until May 1, 2014, and then through September 1, 2014. Teasley returned to work on September 2, 2014, and worked a few shifts during that month.

On September 29, 2014, Teasley's physician provided a letter stating that Teasley could work, with certain restrictions, for the next six months. Those restrictions included no standing for more than two hours; no pushing, pulling, carrying or lifting more than 10 pounds for more than two hours; and no bending, twisting, or stooping at all.

On October 1, 2014, Bayside Medical Center concluded that Teasley was not fit to work at all until January 1, 2015. SpaceX suggested that Teasley seek a reassessment by Bayside Medical Center in mid-November and stated "we will hold your position for you" until "you are able to return to work and perform the essential functions of your job -- with or without reasonable accommodations." Teasley had not returned from her leave of absence at the time of the trial, October 2016.

During Teasley's leave of absence, she spent six to seven days a week weight lifting and training. Teasley frequently posted photos and video of her workouts and fitness competitions on social media. She also trained for, competed in, and won the Ms. Venice Beach bodybuilding contest.

## PROCEDURAL HISTORY

### Complaint and summary judgment motion

Teasley commenced this action against SpaceX on January 8, 2015, asserting causes of action for workplace harassment, sex discrimination, disability discrimination, denial of reasonable accommodation, failure to engage in interactive process, retaliation, wrongful termination, and negligent hiring/supervision.

SpaceX filed a motion for summary judgment, or in the alternative, summary adjudication of Teasley's claims. As relevant to this appeal, the trial court granted summary adjudication of Teasley's wrongful termination claim in SpaceX's favor, finding that Teasley had not been terminated from her employment at SpaceX.

### Motions in limine

Teasley filed a motion in limine seeking to exclude "voluminous 'social media' pictures and posts" on the grounds that such evidence constituted hearsay, was not relevant, and was unduly prejudicial because it showed Teasley when she was "sweaty, at the gym, in workout clothes, and depicting her tattoos." The trial court denied the motion and expressly deferred ruling on the admission of social media evidence until such evidence was offered at trial: "If there's social media that you believe should be excluded, you'll have to object to it . . . and the court will rule on it."

Teasley also filed motions in limine seeking to preclude SpaceX's expert, Dr. Mark Lipian, from testifying to Teasley's credibility or the validity of her claims, and from testifying about hearsay statements in Teasley's medical records. The trial court

denied all of these motions but made clear that such denial would not preclude Teasley from raising evidentiary objections at trial.

**Trial**

The trial commenced on October 17, 2016, and continued for approximately two weeks. Teasley testified that beginning in April 2013, Perez on numerous occasions made sexual comments and gestures toward her, grabbed her and engaged in unwanted touching, and tore her work coveralls. Teasley also testified that on one occasion Perez, believing Teasley had made a mistake on an aluminum welding job, broke the welds apart with a rubber mallet, and repeatedly called her a "stupid cunt." Teasley stated that she did not disclose Perez's alleged harassment until January 2014 because Perez had threatened her and her family.

Teasley admitted, however, that she and Perez became Facebook friends in the summer of 2013, and that in response to a Facebook post by Perez about Teasley stating "so there is a pretty face underneath that welding hood," Teasley posted, in August 2013, "aww, who's my best pal." Teasley also admitted that in December 2013 she gave Perez a Christmas card and a present for his children, and that she introduced Perez to her mother at the SpaceX Christmas party.

Perez testified at trial and denied touching or harassing Teasley, calling her names, or making any sexual or inappropriate comments to her. Perez stated that he and Teasley referred to each other as "friend," that he often spoke to Teasley about his daughters, and that Teasley offered to coach his daughters in softball.

Nguyen, Carreon, and three other welders who worked in Teasley's department at SpaceX testified that none of them had observed Perez behave inappropriately toward Teasley, or touch,

grab, or speak to her in a sexual manner. Nguyen further testified that Teasley often asked to work with Perez.

Angell testified at trial and admitted that he had lied to Suarez-Capdet during SpaceX's investigation of Teasley's allegations against Perez. Angell stated that he never saw Perez touch Teasley and that he had prevaricated because he "wanted to help out a friend." He explained that Teasley had told him she intended to file a lawsuit against SpaceX, and that "she'd get millions for us."

**Bodybuilding video**

During the trial, SpaceX offered into evidence a video recording of Teasley in a bikini performing a choreographed bodybuilding competition routine that Teasley had uploaded to her Instagram account. Teasley objected to the video on the ground that it was cumulative, because she had already testified about the competition. The trial court allowed SpaceX to play the video for the jury, without further objection from Teasley. SpaceX played the video again during closing argument, without objection.

**Expert testimony**

Teasley's expert, psychiatrist Dr. Lester Zackler, testified that he examined Teasley and reviewed her medical history and depositions. Dr. Zackler opined that the emotional distress Teasley experienced during her employment at SpaceX resulted in a severe psychiatric decompensation, causing her to develop symptoms of posttraumatic stress disorder (PTSD), depression, and anxiety. Dr. Zackler further opined that these symptoms had not been present prior to the harassment and assault Teasley allegedly suffered while employed at SpaceX, and had these

incidents not occurred, Teasley would not have developed the mental disorder that resulted in her disability.

In July 2016, Dr. Zackler had Teasley undergo several psychiatric tests, including the Milton Clinical Multiaxial Inventory, the Minnesota Multiphasic Personality Inventory, and the Detailed Assessment of Posttraumatic Stress. The results of those tests showed that Teasley was elevated on the scales for delusional disorder. Teasley's responses to some of the test questions indicated that she believed she was being plotted against, that someone was trying to poison her, that she was being followed, and that someone was trying to take her thoughts and ideas. Dr. Zackler testified that Teasley sometimes suffers from disassociation, "a separation between clear, focused reality and her own internal world of perception and paranoia."

SpaceX's expert, psychiatrist Dr. Mark Lipian, also reviewed Teasley's medical records, school records, correspondence, emails, and deposition testimony and examined Teasley for a full day at his office. Dr. Lipian diagnosed Teasley with Borderline Personality Disorder (BPD). Dr. Lipian explained that the characteristics of one suffering from BPD include the tendency to turn on those perceived to have abandoned or betrayed them and to "storytell," or create false histories. Dr. Lipian further explained that a false history is a form of malingering, "telling an account of your own history . . . that simply is not true. And that changes with the telling and who you tell it to." Dr. Lipian testified that Teasley exhibited these tendencies, noting that Teasley had considered Perez to be a friend until she felt rejected by him when he criticized her work. Dr. Lipian further testified that Teasley gave several different versions of her interactions with Perez, progressively

embellishing her description of events over time to suit the claims asserted in her lawsuit.

Dr. Lipian disagreed with Dr. Zackler's PTSD diagnosis, noting that Teasley's storytelling and her description of purported flashback experiences she had of the incidents with Perez and Angell were not characteristic of PTSD. Dr. Lipian testified that a person suffering from PTSD as the result of a sexual trauma, such as sexual assault or harassment, would not appear in a bikini in front of a crowd because "the last thing they will do is sexualize themselves or do anything that even feels sexual, like showing off their body or wearing a tiny bikini."

At the conclusion of the trial, the jury found in favor of SpaceX on all causes of action. Judgment was entered in SpaceX's favor, and this appeal followed.

## CONTENTIONS ON APPEAL

Teasley raises the following contentions on appeal:

**Alleged evidentiary errors.**

The trial court erred by admitting into evidence the video of Teasley's body building competition because SpaceX failed to provide Teasley with a copy or transcript of the video recording and because the prejudicial impact of the video outweighed any probative value to the jury.

The trial court abused its discretion by allowing SpaceX's expert, Dr. Lipian, (1) to testify outside the scope of his expert designation and deposition testimony, (2) to testify to purported hearsay statements in Teasley's medical records, and (3) to invade the province of the jury by opining on matters that affected Teasley's credibility.

The trial court improperly excluded from evidence SpaceX emails allegedly demonstrating that Teasley was on a list of employees to be terminated.

**Alleged instructional errors**

The trial court erred by giving the jury a modified version of CACI No. 2507, which improperly increased Teasley's burden of proof on her employment discrimination claims.

The trial court erred by giving SpaceX's proposed "business judgment" instruction.

The trial court improperly denied Teasley's request to modify the jury instruction on adverse employment action and retaliation to include as protected activities her disability leave of absence, her request for reasonable accommodation, and her complaint to SpaceX about Angell's alleged sexual assault.

The trial court erred by not instructing the jury pursuant to CACI No. 2511.

**Wrongful termination claim**

The trial court improperly dismissed the wrongful termination claim.

## DISCUSSION

### I. Alleged evidentiary errors

A trial court's rulings on the admissibility of evidence, whether in limine or during trial, are reviewed for abuse of discretion. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) An abuse of discretion occurs only when the trial court's ruling is arbitrary, capricious, and beyond the bounds of reason. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) A trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a "'miscarriage of justice' --that is,

that a different result would have been probable if the error had not occurred. [Citations.]" (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480.)

***A. Bodybuilding video***

We reject Teasley's contentions that she was surprised and prejudiced by SpaceX's introduction of her bodybuilding video because SpaceX failed to provide her with a duplicate and transcript of the video recording, and that the prejudicial impact of the video outweighed any probative value to the jury.

Teasley's claim that she was "sandbagged" by SpaceX's introduction of her bodybuilding video is contradicted by the record, which shows that SpaceX not only provided her with multiple copies of the video, but also disclosed its intent to use that video at trial. SpaceX's motion in limine No. 2, which was served on Teasley, included a DVD containing the bodybuilding video as an exhibit. The motion also described the video and stated SpaceX's intention to introduce it at trial: "Teasley recently 'posted' a video of herself posing in a bikini for numerous spectators in connection with a bodybuilding competition. Defendant seeks to introduce this social media evidence at trial."

SpaceX provided Teasley's counsel with a DVD of the bodybuilding video at the August 3, 2016 deposition of SpaceX's expert, Dr. Lipian. Dr. Lipian then testified about the bodybuilding competition during his deposition.

On October 10, 2017, SpaceX provided Teasley's counsel with an electronic PDF file of its trial exhibits, including a working hyperlink to the URL for the bodybuilding video, in response to a request by Teasley's counsel to "send all documents, videos, diagrams, etc. listed on SpaceX's list that have not been produced," SpaceX again included a working hyperlink to the

video in its trial brief, and reiterated its intent to use the video in its opening statement to the jury. Finally, Teasley admitted during her trial testimony that she recognized a screenshot from the challenged video and that she had posted the video to her own social media account.

Teasley forfeited any claim that SpaceX violated rule 2.1040 of the California Rules of Court[2] by failing to provide her with a transcript of the bodybuilding video because she failed to raise that objection in the trial court. (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 284 (*Smith*) [admissibility of evidence not reviewed on appeal absent a specific and timely objection at trial on the ground sought to be urged on appeal].) A transcript, in any event, would not have been relevant, as the audio on that video consists primarily of background music and crowd noise.

Teasley similarly forfeited any evidentiary challenge to the bodybuilding video as unduly prejudicial by failing to raise that objection in the trial court below. (*Smith, supra*, 214 Cal.App.3d at p. 284.) Her motion in limine No. 11 seeking "to exclude voluminous 'social media' pictures and posts" on the ground that the social media posts were unduly prejudicial did not preserve that objection. The record shows that the trial court denied that motion and made clear that Teasley's counsel could object to any

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[2] California Rules of Court, rule 2.1040(b)(1) provides in part: "[B]efore a party may present or offer into evidence any electronic sound or sound-and-video recording . . . the party must provide to the court and to opposing parties a transcript of the electronic recording . . . ."

social media evidence offered at trial, and that the court would rule on an objection when made.

At trial, SpaceX offered several social media posts by Teasley, including four still photos, before introducing the bodybuilding video. Teasley objected to the first still photo offered by SpaceX under Evidence Code section 352, and to the second still photo on a "running 352." Teasley made no objection to the next two still photos. When SpaceX introduced the bodybuilding video, Teasley objected on the ground that it was "all cumulative." She made no objection under Evidence Code section 352. Teasley also made no objection when SpaceX replayed the video during closing argument.

Teasley's utterance of a single "running 352" objection to a different social media post did not allow her to raise that objection on appeal to the bodybuilding video. The trial court did not allow a "running" objection to all social media posts. Merely asking for a "running" objection, without directing the objection to "'a particular, identifiable body of evidence,'" does not preserve the issue for appeal. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1676.)

The trial court did not abuse its discretion by admitting the challenged video into evidence.

***B. Expert testimony***

None of Teasley's challenges to Dr. Lipian's expert testimony are grounds for reversing the judgment.

**1. Scope of testimony**

Dr. Lipian discussed in his expert report and during his deposition, the four subject areas that Teasley claims were outside the scope of his expert designation: (1) Teasley's

sexualized behavior, (2) the bodybuilding video, (3) Teasley's mother, and (4) Teasley's malingering.

Dr. Lipian's report discussed Teasley's sexualized behavior as support for his opinion that she suffers from borderline personality disorder: "A pathologic experience . . . whether inappropriately violent or inappropriately sexualized or both, predictably will result in a fractured, underdeveloped, unboundaried, and unstable and ephemeral 'partial self.'" During his deposition, Dr. Lipian testified about Teasley's bodybuilding video, noting that Teasley was "winning competitions in 2016 and photographing herself in a very small and revealing bikini upside down and putting herself all over the internet." He then explained why such behavior was inconsistent with a diagnosis of PTSD. Dr. Lipian's testimony at trial, that a person with PTSD caused by a sexual assault would not perform in public in a bikini and post images of it on the internet, was consistent with both his deposition testimony and his expert report.

Dr. Lipian testified at length during his deposition about Teasley's mother, stating that she and Teasley had a "maladaptive bond," with "extraordinary boundary overlap and difficulty," and that the two were "enmeshed." At trial, Dr. Lipian similarly testified that Teasley and her mother had "enormous boundary violation and enmeshment."

Dr. Lipian testified about malingering at both his deposition and at trial. During his deposition, he stated: "I can say to a medical certainty, sometimes [Teasley] is malingering." That testimony is consistent with Dr. Lipian's testimony at trial that people who suffer from borderline personality disorder, such as Teasley, describe false histories, a form of malingering.

Dr. Lipian's trial testimony did not exceed the scope of his deposition or his expert designation.

**2. Hearsay**

Teasley forfeited any hearsay objection to Dr. Lipian's testimony regarding the content of her medical records by failing to make a contemporaneous objection at trial. The only hearsay objection Teasley raised during Dr. Lipian's testimony was to a question concerning references in Teasley's pediatric medical records to Teasley's mother. Before the trial court ruled on the objection, SpaceX's counsel rephrased the question, and Teasley did not renew her objection to the question as rephrased or move to strike the response. Her failure to do so waived the issue on appeal. (Evid. Code, § 353.)

**3. Testimony regarding credibility**

Dr. Lipian's testimony about the credibility of facts and evidence offered to support Teasley's claims did not improperly invade the province of the jury. Based on his review of Teasley's medical records and an independent examination of Teasley, the doctor testified that Teasley does not suffer from PTSD, as her expert, Dr. Zackler opined, but from BPD. Dr. Lipian testified that, among other symptoms, people suffering from BPD tend to storytell, or to create false histories. As support for his diagnosis, he pointed out inconsistencies in Teasley's statements about her symptoms as well as Teasley's changing account of the alleged harassment she suffered while employed at SpaceX. Dr. Lipian's testimony was relevant to weighing and evaluating the experts' differing diagnoses and to assisting the jury in assessing witness credibility.

Dr. Lipian's testimony did not usurp the jury's function. As is true of all expert testimony, the jury remained free to reject it

entirely after considering both experts' opinions, reasons, qualifications, and credibility. California courts "'"have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact." [Citations.]' [Citation.]" (*McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, 1068.)

***C. Exclusion of exhibit 81***

The trial court did not err by excluding Teasley's exhibit 81, a SpaceX series of emails purportedly showing that Teasley was on a list of employees to be terminated. The record shows that the emails were not admitted because Teasley failed to properly authenticate them through the testimony of any person who had personal knowledge of their content.[3]

**II. Alleged instructional errors**

Teasley challenges two instructions the trial court gave to the jury -- modified CACI No. 2507, and a modified "at will" instruction. Teasley also contends the trial court erroneously refused her request to modify the jury instruction on her retaliation claim and failed to instruct the jury pursuant to CACI No. 2511.

We review do novo whether a challenged jury instruction correctly states the law. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298.) We review the refusal to give a jury instruction to determine whether the omission was prejudicial

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[3] Teasley did not attempt to authenticate exhibit 81 by calling as witnesses any of the persons who either sent or received the emails (Nik Cooper, Michael Benzimra, or Jonathan Becht).

and affected the outcome of the trial. (Code Civ. Proc., § 475; *Mitchell v. Gonzalez* (1991) 54 Cal.3d 1041, 1054.)

***A. CACI No. 2507***

The trial court gave the following modified version of CACI No. 2507,[4] which added the italicized language to the standard instruction:

> "**'Substantial Motivating Reason' Explained**"
>
> "A 'substantial motivating reason' is a reason that actually and *substantially* contributed to defendant SpaceX subjecting Plaintiff Zhoei M. Teasley to an adverse employment action. It must be more than a remote or trivial reason. It does not have to be the only motivating reason."

Teasley contends the modified instruction improperly increased her burden of proof by requiring her to prove that her complaints of sexual harassment were actual and substantial reasons for the adverse employment action she purportedly suffered.

Teasley failed to object to the modified CACI No. 2507 instruction during the trial court's jury instruction conference with counsel and arguably waived any objection to that instruction. During the conference, the trial court read the instruction at issue verbatim. When Teasley's counsel asked whether certain language in the proposed instruction was

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[4] CACI No. 2507 states: "A 'substantial motivating reason' is a reason that actually contributed to the [*specify adverse employment action*]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [*adverse employment action*]."

bracketed, the trial court responded, "Does anyone care? I don't think it makes any difference." Teasley's counsel then agreed to the modified CACI No. 2507 instruction by stating: "Okay. That's fine, just want to make sure."

Failure to object to civil jury instructions will not be deemed a waiver when the instruction is prejudicially erroneous as given, i.e., an incorrect statement of the law. (*Bowman v. Wyatt, supra*, 186 Cal.App.4th at p. 298, fn. 7.) The instruction given by the trial court was not an incorrect statement of the law. A jury deciding an employment discrimination claim must be instructed to determine whether discriminatory animus was a "substantial motivating factor/reason" for the adverse employment action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232. (*Harris*).) An instruction to determine whether discrimination was "'a motivating factor/reason'" is insufficient. (*Ibid.*) Teasley was required to show that an illegal reason was both an actual and substantial factor for the adverse employment actions she purportedly suffered. (*Ibid.*) The instruction given by the trial court informed the jury of this requirement.

***B. Business judgment instruction***

Teasley erroneously contends the trial court erred by giving SpaceX's proposed "business judgment" instruction over her objection. The record shows that Teasley objected to a proposed business judgment instruction "as framed by defendant." The trial court did not give the instruction proposed by SpaceX, but instead stated that it would give the following modified version of CACI No. 2400, an instruction concerning "at will" employment: "In California, an employer may take an adverse action against an employee for no reason or for a good, bad, mistaken, unwanted or even unfair reason, as long as the adverse action is not taken

for a discriminatory or retaliatory reason." The court rejected SpaceX's request to add proposed language to that instruction, and Teasley raised no objection whatsoever to the instruction as given by the trial court.

Teasley fails to establish that the modified instruction given by the trial court was an incorrect statement of the law. Under California law, an employee seeking recovery on a claim for unlawful discrimination or retaliation must demonstrate that he or she was subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051-1052.) Once the employee establishes a prima facie case, the employer must offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer does so, the burden shifts back to the employee to prove intentional retaliation. (*Id*. at p. 1042.) To sustain this burden, the employee cannot "'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 75.) "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356.) Teasley fails to demonstrate that the

instruction given by the trial court conflicts with these well-established principles.

***C. Retaliation***

The record does not support Teasley's contention that the trial court improperly denied her request to modify the jury instruction on adverse employment action and retaliation to include as protected activities her disability leave of absence, her request for reasonable accommodation, and her complaint to SpaceX about Angell's alleged sexual assault. The record shows that during the jury instruction conference, Teasley's counsel requested those modifications to the following proposed instruction:

> "In California, an employer may take an adverse action against an employee for no reason or for a good, bad, mistaken, unwanted or even unfair reason, as long as the adverse action is not taken for a discriminatory or retaliatory reason."

Over SpaceX's objection, the trial court agreed to modify the instruction to add the phrase "or has requested a reasonable accommodation" at the end of the last sentence. Teasley raised no further objection to the instruction as modified and accordingly waived any further objection to the instruction as given. (*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 297 (*Carrau*) ["a jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver"].)

### *D. CACI No. 2511*

Teasley contends the trial court erred by not instructing the jury pursuant to CACI No. 2511.[5] The record shows that the trial court agreed to give Teasley's version of this instruction, but inadvertently failed to do so. Teasley failed to object to this omission at the time the trial court could have corrected it and therefore forfeited any appellate challenge based on that omission. (See *Carrau, supra,* 93 Cal.App.4th at p. 297.)

The omission was harmless in any event, as Teasley failed to establish that she suffered any adverse employment action or constructive discharge, as discussed further in section III below. Teasley's opening appellate brief fails to explain how she was

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[5] Teasley requested that the jury be instructed pursuant to the following version of CACI No. 2511: "In this case, the decision to take adverse employment action against or constructively discharge PLAINTIFF ZHOEI M. TEASLEY was made by Gynne Shotwell or other officer, agent, or employee of DEFENDANT SPACEX. Even if Gynne Shotwell or other officer, agent, or employee of DEFENDANT SPACEX did not hold any discriminatory or retaliatory intent or were unaware of PLAINTIFF ZHOEI M. TEASLEY's conduct on which the claim of retaliation is based, DEFENDANT SPACEX may still be liable for discrimination or retaliation if PLAINTIFF ZHOEI M. TEASLEY proves both of the following: [¶] That PLAINTIFF ZHOEI M. TEASLEY'S gender or disability was a substantial motivating reason for DEFENDANT SPACEX's adverse employment action or constructive discharge against PLAINTIFF ZHOEI M. TEASLEY; and [¶] That PLAINTIFF ZHOEI M. TEASLEY's supervisor's actions were a substantial motivating reason for Gynne Shotwell's or other officer, agent, or employee of DEFENDANT SPACEX's decision to take adverse employment action or constructively discharge PLAINTIFF ZHOEI M. TEASLEY."

prejudiced by the omission. In her reply brief, Teasley claims that SpaceX's CEO, Gwynne Shotwell, was identified in the jury instruction as one of the decisionmakers responsible for a "head count" policy that resulted in Teasley's placement on a "termination list." Teasley argues that the omitted instruction "directly contributed to the jury's confusion about the evidence of retaliatory adverse employment actions that occurred while she was out on her leave of absence." As discussed, the purported "termination list" was never admitted into evidence because Teasley failed to properly authenticate that document, and Teasley fails to explain what other evidence of retaliatory adverse employment action was presented, and how the omitted instruction resulted in jury confusion about that evidence.

**III. Wrongful termination claim**

We review de novo the trial court's dismissal of Teasley's wrongful termination claim after the court summarily adjudicated that claim in SpaceX's favor. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 452, fn. 3.) The record discloses no reversible error.

The undisputed evidence showed that Teasley was still employed by SpaceX at the time of the trial. SpaceX never terminated her employment, and Teasley never resigned or quit. In her June 22, 2015 deposition, Teasley indicated she might possibly return to work at SpaceX.

In this appeal, Teasley argues that triable issues of material fact existed as to whether she was constructively discharged because SpaceX failed to provide her with reasonable accommodations when she returned to work in September 2014. "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence

standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated *at the time of the employee's resignation* that a reasonable employer would realize that a reasonable person in the employees position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246-1251, italics added.) Resignation from employment is thus a necessary element of a wrongful constructive discharge claim. (*Ibid.*) Here, there was no evidence that Teasley resigned from her position at SpaceX.

**DISPOSITION**

The judgment is affirmed. SpaceX is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST